

**FEDERAL MARITIME COMMISSION**

**46 CFR Parts 501 and 502**

**DOCKET NO. 15-06**

**RIN: 3072-AC61**

**Organization and Functions; Rules of Practice and Procedure; Attorney Fees**

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Maritime Commission proposes to amend its Rules of Practice and Procedure governing the award of attorney fees in Shipping Act complaint proceedings, and its regulations related to Commissioner terms and vacancies. The proposed regulatory changes would implement statutory amendments made by the Howard Coble Coast Guard and Maritime Transportation Act of 2014.

**DATES:** Comments are due on or before: August 6, 2015.

**ADDRESSES:** You may submit comments, identified by Docket No. 15-06, by the following methods:

- *E-mail:* [secretary@fmc.gov](mailto:secretary@fmc.gov). Include in the subject line: "Docket No. 15-06, Comments on Proposed Attorney Fee and Term Limit Regulations." Comments should be attached to the e-mail as a Microsoft Word or text-searchable PDF document. Only non-confidential comments and public versions of confidential comments should be submitted by e-mail. Comments containing confidential information should not be submitted by e-mail.
- *Mail:* Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001.

*Docket:* For access to the docket to read background documents and comments received, go to the Commission's Electronic Reading Room at: <http://www.fmc.gov/15-06>.

*Confidential Information:* If your comments contain confidential information, you must submit the following:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked "Confidential-Restricted," and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The public version must state "Public Version—confidential materials excluded" on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by e-mail or mail.

The Commission will provide confidential treatment for the identified confidential information to the extent allowed by law.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding submitting comments or the treatment of confidential information, contact Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001. *Phone:* (202) 523-5725. *E-mail:* [secretary@fmc.gov](mailto:secretary@fmc.gov).

For all other questions, contact William H. Shakely, Office of the General Counsel, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001. *Phone:* (202) 523-5740. *E-mail:* [generalcounsel@fmc.gov](mailto:generalcounsel@fmc.gov).

## **SUPPLEMENTARY INFORMATION:**

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### **I. Executive Summary**

Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281 (Coble Act), enacted on December 18, 2014, made amendments to the Shipping Act of 1984 and the statutory provisions governing the general organization of the Commission. Specifically, section 402 of the Coble Act amended the statutory provision governing the award of attorney fees in Shipping Act complaint proceedings. Attorney fees may now be awarded to the prevailing party in any complaint proceeding. *See* 46 U.S.C. 41305(e). Section 403 of the Coble Act established term limits for future Commissioners, limited the amount of time that future Commissioners will be permitted to serve beyond the end of their terms, and established conflict-of-interest restrictions for current and future Commissioners. *See* 46 U.S.C. 301(b).

In response to these statutory amendments, the Commission is proposing to amend affected regulations to conform the regulatory language to the revised statutory text.<sup>1</sup> In addition, the Commission is seeking comment on an appropriate framework for determining attorney fee awards under the amended fee-shifting provision. The Commission is considering providing additional guidance on this issue in the final rule and, where appropriate, incorporating that guidance into the Commission Rules of Practice and Procedure. To that end, this proposal discusses three general questions on which the Commission's guidance would focus:

- Who is eligible to recover attorney fees?
- How will the Commission exercise its discretion to determine whether to award attorney fees to an eligible party?
- How will the Commission apply the new attorney-fee provision to proceedings that were pending before the Commission when the Coble Act was enacted on December 18, 2014?

Although the Commission recognizes that the application of the fee-shifting provision will depend on the specific facts in individual complaint proceedings, the Commission believes that general guidance on these broader issues will reduce uncertainty and simplify the disposition of attorney-fee issues.

## **II. Background**

### **A. Attorney Fees**

Section 11(a)–(b) of the Shipping Act of 1984, currently codified at 46 U.S.C. 41301, establishes a procedure by which a person may file a complaint with the Commission alleging a

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<sup>1</sup> The Coble Act amendments to 46 U.S.C. 301(b) establishing conflict-of-interest restrictions for Commissioners are outside the scope of this rulemaking. The Commission is currently evaluating the need for regulatory action in response to these amendments.

violation of the Shipping Act.<sup>2</sup> Prior to the enactment of the Coble Act, 46 U.S.C. 41305(b) (section 11(g) of the Shipping Act) provided that “[i]f the complaint was filed within . . . [three years after the claim accrued], the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.”

To implement the statutory provision in section 11(g) mandating the award of attorney fees, the Commission added a sentence to Rule 253 of its Rules of Practice and Procedure. Final Rules To Implement the Shipping Act of 1984 and To Correct and Update Regulations, 49 FR 16994 (Apr. 23, 1984). After determining that more comprehensive regulations were needed, the Commission established Rule 254 (46 CFR 502.254) in 1987. Attorney’s Fees in Reparation Proceedings, 52 FR 6330 (Mar. 3, 1987).

The Commission interpreted section 11(g) as providing for attorney fees only to *prevailing complainants* in reparation proceedings, and Rule 254 reflects this limitation. *See* Attorney’s Fees in Reparation Proceedings, 51 FR 37917 (Oct. 27, 1986); 46 CFR 502.254. In subsequent decisions, the Commission specified three conditions for recovering attorney fees pursuant to Rule 254: “(1) a violation of the 1984 Act; (2) actual injury caused by such violation; and (3) payment of reparations to compensate for such injury.” *A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro*, 25 S.R.R. 1061, 1063 (FMC 1990). Complainants who prevailed on the merits of the complaint, but who did not obtain a reparations award, were not eligible to recover attorney fees. *See id.* at 1064; 51 FR 37917.

Section 402 of the Coble Act deleted the portion of 46 U.S.C. 41305(b) pertaining to attorney fees and added a new subsection (e), which reads as follows: “ATTORNEY FEES.—In any

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<sup>2</sup> The Shipping Act also authorizes the Commission to initiate investigations of possible violations of the Shipping Act on its own motion. 46 U.S.C. 41302.

action brought under section 41301, the prevailing party may be awarded reasonable attorney fees.” These amendments appear to affect the award of attorney fees in three significant ways. First, the revised language expands the categories of persons eligible to recover attorney fees to include any “prevailing party,” not merely prevailing complainants. Second, the award of attorney fees is no longer conditioned on an award of reparations; under the amended language, attorney fees are recoverable “[i]n any action brought under section 41301.” Finally, whereas 46 U.S.C. 41305(b) directed the Commission to award reasonable attorney fees to an eligible party, the new provision in subsection (e) states that such fees “may be awarded,” thus granting the Commission discretion to determine the circumstances under which eligible parties are entitled to attorney fees.

There is limited legislative history for section 402. An informational brochure about the Coble Act issued by the House Transportation and Infrastructure Committee states only that “th[e] section clarifies that in actions filed with the FMC alleging a violation of law pertaining to ocean shipping, the prevailing party in the proceeding may be awarded reasonable attorney fees.”<sup>3</sup>

## **B. Commissioner Terms and Vacancies**

The statutory provisions governing the general organization of the Commission are codified at 46 U.S.C. 301. Prior to the enactment of the Coble Act, there was no statutory limit on the number of terms a Commissioner could serve. In addition, when a Commissioner’s term ended, the Commissioner could continue to serve until a successor was appointed, without any prescribed time limitation. The Commission’s regulations at 46 CFR 501.2(c) reflect these statutory provisions. Section 403 of the Coble Act amended 46 U.S.C. 301(b) and established term limits for Commissioners appointed and confirmed by the Senate on or after the date of enactment, i.e.,

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<sup>3</sup> House Committee on Transportation & Infrastructure, The Howard Coble Coast Guard & Maritime Transportation Act of 2014, at 20 (2014), available at <http://transportation.house.gov/uploadedfiles/coastguardreauthsenateagreement.pdf>.

December 18, 2014. Specifically, future Commissioners will be limited to two terms, in addition to the remainder of any term for which the Commissioner's predecessor was appointed. *See* 46 U.S.C. 301(b)(2)–(3). Section 403 also limited the amount of time future Commissioners will be permitted to serve beyond the end of their terms, to a period not to exceed one year. *See* 46 U.S.C. 301(b)(2).

### **III. Proposal**

#### **A. Conforming Amendments**

Given the amendments made by the Coble Act to 46 U.S.C. 301 and 41305, the Commission is proposing amendments to its regulations to implement the revised statutory text.

##### **1. Attorney-Fee Provision**

The Commission proposes to amend Rule 254 of its Rules of Practice and Procedure to conform the regulatory text to the revised language of 46 U.S.C. 41305. The proposed amendments include:

- replacing references to “complainant” with “prevailing party”;
- replacing references to “respondent” with “opposing party”;
- replacing references to reparations awards with references to complaint proceedings more generally; and
- amending the language to clarify that the Commission now has discretion regarding the award of fees, and that fee petitions may be denied.

The Commission is also proposing to delete the clause stating that recoverable attorney fees include compensation for services in related federal court proceedings. The Commission originally included this language based on the text of the previous statutory fee-shifting provision and its legislative history. 52 FR 6330 (Mar. 3, 1987). Given the textual differences between that

provision and the fee-shifting provision added by the Coble Act, combined with the absence of any legislative history regarding the applicability of the new fee-shifting provision to services performed in other proceedings, the Commission has tentatively determined to remove this language. Under the amended Rule 254 as proposed below, the Commission would resolve any issues related to compensation for services performed in other proceedings on a case-by-case basis, in accordance with relevant federal case law.

The Commission requests comment on these proposed amendments and any other amendments necessary to reflect the amended statutory language.

In addition to the substantive amendments to its Rules of Practice and Procedure described above, the Commission is proposing a number of minor changes to improve the clarity and organization of Rule 254. For example, the Commission is proposing to add cross-references to relevant provisions governing formal and informal small claims. Although the Commission Rules state that Rule 254 applies to such claims, *see* 46 CFR 502.305, 502.321, the requirements for filing fee petitions inadvertently omit relevant references to these claims. Likewise, the Commission is proposing conforming edits to these rules to reflect the proposed amendments to Rule 254.

The Commission is also proposing to replace the term “presiding officer” in Rule 254 with the phrase, “administrative law judge or small claims officer.” As used in Rule 254, the term “presiding officer” is meant to include these officials but not members of the Commission. This could create confusion because, as defined in Rule 25, “presiding officer” can mean an administrative law judge or one or more members of the Commission, and small claims officers are not expressly included in the definition. *See* 46 CFR 502.25(a).



## **2. Terms and Vacancies Provisions**

The Commission proposes to amend 46 CFR 501.2(c) to conform the regulatory text to the revised language of 46 U.S.C. 301(b). Specifically, the Commission proposes dividing paragraph (c) into several subparagraphs addressing the length of Commissioner terms, removal of Commissioners, vacancies on the Commission, and term limits for both current and future Commissioners.

### **B. Implementing the Amended Attorney-Fee Provision**

The Commission seeks comment on an appropriate framework for determining attorney fee awards under the amended fee-shifting provision. Specifically, the Commission would like to provide general guidance in the final rule on the following questions:

- Who is eligible to recover attorney fees?
- How will the Commission exercise its discretion to determine whether to award attorney fees to an eligible party?
- How will the Commission apply the new attorney-fee provision to proceedings that were pending before the Commission when the Coble Act was enacted on December 18, 2014?

This proposal discusses various options to address these issues that are currently being considered. We request comment on these options.

#### **1. Who is Eligible to Recover Attorney Fees?**

As discussed in the Background section, prior to the enactment of the Coble Act, the Shipping Act provided for the award of attorney fees to prevailing complainants in reparation proceedings. The new attorney-fee provision added by the Coble Act provides for the award of attorney fees to the prevailing party in any action brought under section 41301. This raises several questions including:

- What types of actions are covered by the attorney-fee provision?
- Who is considered a “party”?
- When will a “party” be considered to have “prevailed” in a covered action?

Examining the first question, section 41301 permits a person to file a complaint with the Commission alleging a violation of the Shipping Act. 46 U.S.C. 41301(a). The Commission is required to provide a copy of the complaint to the person named in the complaint, and, if the complaint is not satisfied, the Commission is directed to investigate the complaint in an appropriate manner and make an appropriate order. 46 U.S.C. 41301(b)–(c). Based on the wording of the Coble Act’s attorney-fee provision and the wording of section 41301, it appears that attorney fees may now be awarded in any complaint proceeding. The Commission requests comment on this interpretation.

Regarding the second question, the Commission’s Rules define the term “party” in Commission proceedings to include any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, or government agency (including a unit representing the agency). 46 CFR 502.41. The Commission requests comment on any reasons why the existing definition would not be appropriate to use in applying the new attorney-fee provision.

When a party will be considered to have “prevailed” in a complaint proceeding is a more complex issue because of the number of different possible outcomes. The Commission notes, however, that a number of fee-shifting provisions in other statutes also provide for the award of fees to the “prevailing party,” and there is abundant case law interpreting the term. *See, e.g.*, 17 U.S.C. 505; 42 U.S.C. 1988(b); 42 U.S.C. 2000a-3(b); 42 U.S.C. 2000e-5(k). Therefore, the Commission proposes to rely on relevant federal case law to the extent practicable in determining

whether a party has “prevailed” in a particular complaint proceeding and is thus eligible to recover attorney fees under the new fee-shifting provision. The Commission requests comment on this approach and any alternative approaches.

## **2. How Will the Commission Exercise Its Discretion?**

The text of the new attorney-fee provision is silent as to how the Commission should exercise its discretion in awarding fees to an eligible party. The provision neither describes a standard of entitlement nor lists any factors for consideration, and the sparse legislative history provides little guidance. Therefore, the Commission has examined the standards used by federal courts in determining entitlement to attorney fees under provisions with language similar to 46 U.S.C. 41305(e), i.e., those provisions that allow for, but do not require, the award of attorney fees to the prevailing party in an action. The Commission has identified two prevalent standards used by the federal courts in determining fee entitlement under this type of provision.

The first is the standard used by federal courts applying the fee-shifting provision in the Copyright Act, 17 U.S.C. 505. The Supreme Court has cited with approval a nonexclusive list of factors for courts to consider when determining entitlement, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (quoting *Lieb v. Topstone Industries, Inc.*, 788 F.2d 151, 156 (3rd Cir. 1986)) (internal quotation marks omitted). In addition, the courts use the same standard for prevailing plaintiffs and prevailing defendants when making such determinations. *See Fogerty*, 510 U.S. at 534–35.

The second standard identified by the Commission is used in determining entitlement to attorney fees under the Civil Rights Act, e.g., 42 U.S.C. 2000a-3(b), 42 U.S.C. 2000e-5(k). Under

this standard, prevailing plaintiffs are treated more favorably than prevailing respondents when determining entitlement to attorney fees. While prevailing plaintiffs “ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust,” *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968), prevailing defendants are awarded attorney fees only “upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.” *Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 421 (1978).

The Commission requests comment on these two standards and whether either standard would be appropriate to use in applying the new attorney-fees provision in complaint proceedings. In particular, the Commission requests comment on the factors considered under each standard in determining entitlement and whether the same standard should apply to prevailing complainants and prevailing respondents. The Commission further requests comment on any other standards the Commission should consider.

The Commission also seeks feedback on the following questions: Should the Commission decline to adopt any framework as part of this rulemaking and, instead, address all entitlement issues through the formal adjudication process? If the Commission decides to adopt one of the standards used by the courts, should any additional criteria be added? For example, if the Commission were to adopt the nonexclusive list of factors used in Copyright Act attorney-fee determinations, are there additional factors the Commission should consider in light of the purpose of the Shipping Act and the nature of complaint proceedings brought under the Act? Should the standard for entitlement used by the Commission depend on the type of proceeding? For example, should the Commission use a standard more favorable to complainants in small claims

proceedings, which often, though not always, involve individuals who file complaints against businesses with greater resources?

### **3. How Will the Commission Apply the Provision to Pending Proceedings?**

The effective date of the Coble Act was December 18, 2014, and given the differences between 46 U.S.C. 41305(e) and the previous attorney-fee provision, the Commission will likely need to address whether and how section 41305(e) applies to complaint proceedings that were initiated prior to December 18, 2014, and are still pending before the Commission.

In determining the applicability of a newly enacted statute to pending cases, the courts first look to “whether Congress has expressly prescribed the statute’s proper reach.” *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (internal quotation marks omitted)). If the statute’s reach cannot be determined from the text and the application of the normal rules of statutory construction, the court must “determine whether the application of the statute to the conduct at issue would result in a retroactive effect,” *Martin v. Hadix*, 527 U.S. 343, 352 (1999), i.e., “whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Landgraf*, 511 U.S. at 280; *see also Fernandez-Vargas* at 548 U.S. at 37. “If the answer is yes,” the courts then apply the traditional “presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the ‘absen[ce of] a clear indication from Congress that it intended such a result.’” *Fernandez-Vargas* at 548 U.S. at 37–38 (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 316 (2001)); *see also Landgraf*, 511 U.S. at 280. In cases in which the statute would not have a “genuinely ‘retroactive’ effect,” the general rule is that a court “should ‘apply the law in effect at the time it renders its decision,’ even though that law was enacted after the events that gave rise to

the suit.” *Landgraf*, 511 U.S. at 273, 277 (quoting *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974)) (citation omitted).

One option for addressing attorney-fee determinations in pending proceedings would be to analyze the specific facts of individual cases under the framework above and determine whether application of the new provision would have a retroactive effect. If it would not, the Commission would apply the new provision to determine entitlement to attorney fees.

The Commission requests comment on this approach and any alternative approaches. Would a bright line rule be preferable? For example, the Commission could establish a rule stating that it will apply the previous entitlement standard in all complaint proceedings initiated before a certain date, such as the enactment date of the Coble Act.

#### **IV. Rulemaking Analyses and Notices**

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of the proposed rule on small entities. 5 U.S.C. 603. An agency is not required to publish an IRFA, however, for the following types of rules, which are excluded from the APA’s notice-and-comment requirement: interpretative rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553.

Although the Commission has elected to seek public comment on its proposed regulatory amendments and the application of the Coble Act’s new attorney-fee provision, these matters

concern the organization of the Commission, its practices and procedures, and its interpretation of statutory provisions. Therefore, the APA does not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare an IRFA.

#### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. The Commission is not proposing any collections of information, as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), as part of this proposed rule.

#### *Regulation Identifier Number*

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

#### **List of Subjects**

##### *46 CFR part 501*

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies), Seals and insignia.

##### *46 CFR part 502*

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

### **Proposed Regulatory Text**

For the reasons stated in the preamble, the Commission proposes to amend 46 CFR parts 501 and 502 as follows:

#### **PART 501—THE FEDERAL MARITIME COMMISSION—GENERAL**

1. The authority citation for part 501 continues to read as follows:

**Authority:** 5 U.S.C. 551-557, 701-706, 2903 and 6304; 31 U.S.C. 3721; 41 U.S.C. 414 and 418; 44 U.S.C. 501-520 and 3501-3520; 46 U.S.C. 301-307, 40101-41309, 42101-42109, 44101-44106; Pub. L. 89-56, 70 Stat. 195; 5 CFR Part 2638; Pub. L. 104-320, 110 Stat. 3870.

2. Amend § 501.2 by revising paragraph (c) to read as follows:

#### **§ 501.2 General.**

\* \* \* \* \*

(c) *Terms and vacancies.* (1) *Length of terms.* The term of each member of the Commission is five years and begins when the term of the predecessor of that member ends (i.e., on June 30 of each successive year).

(2) *Removal.* The President may remove a Commissioner for inefficiency, neglect of duty, or malfeasance in office.

(3) *Vacancies.* A vacancy in the office of any Commissioner is filled in the same manner as the original appointment. An individual appointed to fill a vacancy is appointed only for the unexpired term of the individual being succeeded.



(4) *Term Limits* (i) *Commissioners appointed and confirmed before December 18, 2014.*

When a Commissioner's term ends, the Commissioner may continue to serve until a successor is appointed and qualified.

(ii) *Commissioners appointed and confirmed on or after December 18, 2014.* (A) When a Commissioner's term ends, the Commissioner may continue to serve until a successor is appointed and qualified, limited to a period not to exceed one year.

(B) No individual may serve more than two terms, except that an individual appointed to fill a vacancy may serve two terms in addition to the remainder of the term for which the predecessor of that individual was appointed.

\* \* \* \* \*

## **PART 502—RULES OF PRACTICE AND PROCEDURE**

3. The authority citation for part 502 continues to read as follows:

**Authority:** 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561-569, 571-596; 5 U.S.C. 571-584; 18 U.S.C. 207; 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103-40104, 40304, 40306, 40501-40503, 40701-40706, 41101-41109, 41301-41309, 44101-44106; E.O. 11222 of May 8, 1965.

### **Subpart O—Reparation; Attorney Fees**

4. Revise the heading of Subpart O to read as set forth above.

5. Revise § 502.254 to read as follows:

#### **§ 502.254 Attorney fees in complaint proceedings.**

(a) *General.* In any complaint proceeding brought under section 11(a) of the Shipping Act of 1984 (46 U.S.C. 41301), the Commission may, upon petition, award the prevailing party reasonable attorney fees.

(b) *Definitions.*

*Attorney fees* means the fair market value of the services of any person permitted to appear and practice before the Commission in accordance with subpart B of this part.

*Decision* means:

- (1) an initial decision or dismissal order issued by an administrative law judge;
- (2) a final decision issued by a small claims officer; or
- (3) a final decision issued by the Commission.

(c) *Filing petitions for attorney fees.* (1) In order to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final. For purposes of this section, a decision is considered final when the time for seeking judicial review has expired or when a court appeal has terminated.

(2) The prevailing party must file the petition with either:

- (i) the administrative law judge or small claims officer, if that official's decision became administratively final under § 502.227(a)(3), § 502.227(c), § 502.304(g), or § 502.318(a); or
- (ii) the Commission, if the Commission reviewed the decision of the administrative law judge or small claims officer under § 502.227, § 502.304, or § 502.318.

(d) *Content of petitions.* The petition must specify the number of hours claimed by each person representing the prevailing party at each identifiable stage of the proceeding, and must be supported by evidence of the reasonableness of the hours claimed and the customary rates charged by attorneys and associated legal representatives in the community where the person practices. The petition may request additional compensation, but any such request must be supported by evidence that the customary rates for the hours reasonably expended on the case would result in an unreasonably low fee award.

(e) *Replies to petitions.* The opposing party may file a reply to the petition within 20 days of the service date of the petition. The reply may address the reasonableness of any aspect of the prevailing party's claim and may suggest adjustments to the claim under the criteria stated in paragraph (d) of this section.

(f) *Rulings on petitions.* (1) Upon consideration of a petition and any reply thereto, the Commission, administrative law judge, or small claims officer will issue an order granting or denying the petition.

(i) If the order awards the prevailing party attorney fees, the order will state the total amount of attorney fees awarded, specify the compensable hours and appropriate rate of compensation, and explain the basis for any additional adjustments.

(ii) If the order denies the prevailing party attorney fees, the order will explain the reasons for the denial.

(2) The Commission, administrative law judge, or small claims officer may adopt a stipulated settlement of attorney fees.

(g) *Timing of rulings.* An order granting or denying a petition for attorney fees will be served within 60 days of the date of the filing of the reply to the petition or expiration of the reply period, except that in cases involving a substantial dispute of facts critical to the determination of an award, the Commission, administrative law judge, or small claims officer may hold a hearing on such issues and extend the time for issuing an order by an additional 30 days.

(h) *Appealing rulings by administrative law judge or small claims officer.* When an administrative law judge or small claims officer issues an order granting or denying a fee petition, § 502.227 governs the appeal of that order and Commission review of that order in the absence of appeal. [Rule 254.]

6. Amend § 502.305 by revising paragraph (b) to read as follows:

**§ 502.305 Applicability of other rules of this part.**

\* \* \* \* \*

(b) The following sections in subparts A through Q of this part apply to situations covered by this subpart: §§ 502.2(a) (Requirement for filing); 502.2(f)(1) (Email transmission of filings); 502.2(i) (Continuing obligation to provide contact information); 502.7 (Documents in foreign languages); 502.21-502.23 (Appearance, Authority for representation, Notice of appearance; substitution and withdrawal of representative); 502.43 (Substitution of parties); 502.101 (Computation); 502.117 (Certificate of service); 502.253 (Interest in reparation proceedings); and 502.254 (Attorney fees in complaint proceedings). [Rule 305.]

7. Amend § 502.318 by revising paragraph (b) to read as follows:

**§ 502.318 Decision.**

\* \* \* \* \*

(b) Attorney fees may be awarded to the prevailing party in accordance with § 502.254. [Rule 318.]

8. Amend § 502.321 by revising paragraph (b) to read as follows:

**§ 502.321 Applicability of other rules of this part.**

\* \* \* \* \*

(b) The following sections in subparts A through Q apply to situations covered by this subpart: §§ 502.2(a) (Requirement for filing); 502.2(f)(1) (E-mail transmission of filings); 502.2(i) (Continuing obligation to provide contact information); 502.7 (Documents in foreign languages); 502.21-502.23 (Appearance, Authority for representation, Notice of appearance; substitution and

withdrawal of representative); 502.43 (Substitution of parties); 502.253 (Interest in reparation proceedings); and 502.254 (Attorney fees in complaint proceedings). [Rule 321.]

By the Commission.

Karen V. Gregory  
Secretary